

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

Cr. No. 17-965 KG

KIRBY CLEVELAND,

Defendant.

**SECOND REPORT BY THE MAGISTRATE JUDGE**

The Honorable Kenneth Gonzales referred this matter to me with instructions that I conduct an *in camera* review of the Government's file in *United States v. Cleveland*, Cr. No. 12-2062 MCA and then prepare findings on his participation, if any, as United States Attorney in that case. *Doc. 37*. In my January 26, 2018 initial Report and Recommendation (*Doc. 38*), I concluded that Judge Gonzales is not required to recuse under 28 U.S.C. § 455(b)(3), because he had not actively participated in that case while serving as United States Attorney.

On February 1, 2018, I was again requested to conduct another *in camera* review – this time reviewing certain e-mail from the U.S. Attorney's Office server. None of the submitted e-mail documents reflect active participation by Judge Gonzales in that prosecution. Thus, again recusal does not appear mandatory pursuant to Section 455(b)(3).

Out of an abundance of caution, however, I believe that one e-mail should be disclosed in light of the Government's Response (*Doc. 41*) to Defendant Cleveland's

recently filed Motion for Recusal pursuant to 28 U.S.C. § 455(a). *Doc. 40*. In its Response to that Motion, the Government states:

No reasonable person could conclude that simply because Judge Gonzales made prosecution in Indian Country a priority that, absent some evidence to the contrary, he would have somehow taken an interest in one particular case out of the over nine thousand that were filed during his term as United States Attorney. There is no issue with an appearance of impartiality in light of Judge Gonzales' initiative.

*Doc. 41* at 7.

I am attaching to this Report a July 18, 2013 e-mail from then-United States Attorney Gonzales to AUSA Novaline Wilson in response to an e-mail distributing two U.S. Attorney's Office press releases from that same day. Press Release No. 1 related to the sentencing of Erick MacDonald on child sexual abuse charges arising out of the Navajo Nation that identified Ms. Wilson as the prosecutor in that case. Press Release No. 2 related to the guilty plea entered by Defendant Cleveland in Cr. No. 12-2062 MCA, and at its end identified the case as "being prosecuted by Assistant U.S. Attorneys Jacob Wishard and Novaline D. Wilson." The congratulatory e-mail sent by now-Judge Gonzales states only, "Nice job, Nova!"

No other e-mails seemed potentially relevant to the recusal inquiry. Because the Section 455(a) "appearance of impartiality" analysis requires consideration of all relevant information and would extend beyond the documents that I have reviewed *in camera*, a further recommendation seems outside the scope of the order of referral.

**IT IS HEREBY ORDERED** that the parties file any objections to this Second Report by the Magistrate Judge no later than the end of business on February 9, 2018.

  
UNITED STATES CHIEF MAGISTRATE JUDGE